

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

THOMAS GREGORY SHEA,

3:18-cv-00112-RCJ-CBC

Plaintiff,

v.

ANDREW SAUL¹,
 Acting Commissioner of Social Security,

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE²

Defendant.

This case involves the judicial review of an administrative action by the Commissioner of Social Security (“Commissioner”) denying Thomas Gregory Shea’s (“Shea”) application for supplemental security income payments pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383. Currently pending before the Court is Shea’s motion for reversal or remand. (ECF No. 17.) In this motion, Shea seeks the reversal of the administrative decision and remand for an award of benefits. (*Id.*) The Commissioner filed a response and cross-motion to affirm (ECF Nos. 18/19), and Shea filed a reply and response to the cross-motion (ECF Nos. 21/22). For the reasons set forth herein, the Court recommends that Shea’s motion for remand, (ECF No. 17), be granted, and the Commissioner’s cross-motion to affirm, (ECF No. 18), be denied.

I. STANDARDS OF REVIEW

A. Judicial Standard of Review

This Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). See *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g) provides that “[a]ny individual, after any final decision of

¹ Andrew Saul is now the Commissioner of Social Security and is automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).

² This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 the Commissioner of Social Security made after a hearing to which he was a party,
2 irrespective of the amount in controversy, may obtain a review of such decision by a civil
3 action ... brought in the district court of the United States for the judicial district in which
4 the plaintiff resides.” The Court may enter, “upon the pleadings and transcript of the record,
5 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
6 Security, with or without remanding the cause for a rehearing.” *Id.*

7 The Court must affirm an Administrative Law Judge’s (“ALJ”) determination if it is
8 based on proper legal standards and the findings are supported by substantial evidence
9 in the record. *Stout v. Comm’r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006);
10 *see also* 42 U.S.C. § 405(g) (“findings of the Commissioner of Social Security as to any
11 fact, if supported by substantial evidence, shall be conclusive”). “Substantial evidence is
12 more than a mere scintilla but less than a preponderance.” *Bayliss v. Barnhart*, 427 F.3d
13 1211, 1214 n.1 (9th Cir. 2005) (internal quotation marks and citation omitted). “It means
14 such relevant evidence as a reasonable mind might accept as adequate to support a
15 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842
16 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83
17 L.Ed. 126 (1938)); *see also Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).

18 To determine whether substantial evidence exists, the Court must look at the
19 administrative record as a whole, weighing both the evidence that supports and
20 undermines the ALJ’s decision. *Orteza v. Shalala*, 50 F.3d 748, 749 (9th Cir. 1995)
21 (citation omitted). Under the substantial evidence test, a court must uphold the
22 Commissioner’s findings if they are supported by inferences reasonably drawn from the
23 record. *Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2003).
24 “However, if evidence is susceptible of more than one rational interpretation, the decision
25 of the ALJ must be upheld.” *Shalala*, 50 F.3d at 749 (citation omitted). The ALJ alone is
26 responsible for determining credibility and for resolving ambiguities. *Meanel v. Apfel*, 172
27 F.3d 1111, 1113 (9th Cir. 1999).

1 It is incumbent on the ALJ to make specific findings so that the court does not
2 speculate as to the basis of the findings when determining if substantial evidence supports
3 the Commissioner's decision. The ALJ's findings should be as comprehensive and
4 analytical as feasible and, where appropriate, should include a statement of subordinate
5 factual foundations on which the ultimate factual conclusions are based, so that a
6 reviewing court may know the basis for the decision. See *Gonzalez v. Sullivan*, 914 F.2d
7 1197, 1200 (9th Cir. 1990).

8 B. Standards Applicable to Disability Evaluation Process

9 The individual seeking disability benefits bears the initial burden of proving
10 disability. *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the
11 individual must demonstrate the "inability to engage in any substantial gainful activity by
12 reason of any medically determinable physical or mental impairment which can be
13 expected ... to last for a continuous period of not less than 12 months." 42 U.S.C. §
14 423(d)(1)(A). More specifically, the individual must provide "specific medical evidence" in
15 support of his claim for disability. See 20 C.F.R. § 404.1514. If the individual establishes
16 an inability to perform his prior work, then the burden shifts to the Commissioner to show
17 that the individual can perform other substantial gainful work that exists in the national
18 economy. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998).

19 The first step requires the ALJ to determine whether the individual is currently
20 engaging in substantial gainful activity ("SGA"). 20 C.F.R. §§ 404.1520(b), 416.920(b).
21 SGA is defined as work activity that is both substantial and gainful; it involves doing
22 significant physical or mental activities, usually for pay or profit. 20 C.F.R. §§ 404.1572(a)-
23 (b), 416.972(a)-(b). If the individual is currently engaging in SGA, then a finding of not
24 disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to
25 the second step.

26 The second step addresses whether the individual has a medically determinable
27 impairment that is severe or a combination of impairments that significantly limits him from
28 performing basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment or

1 combination of impairments is not severe when medical and other evidence establish only
2 a slight abnormality or a combination of slight abnormalities that would have no more than
3 a minimal effect on the individual's ability to work. 20 C.F.R. §§ 404.1521, 416.921; Social
4 Security Rulings ("SSRs") 85-28 and 96-3p.1 If the individual does not have a severe
5 medically determinable impairment or combination of impairments, then a finding of not
6 disabled is made. If the individual has a severe medically determinable impairment or
7 combination of impairments, then the analysis proceeds to the third step.

8 The third step requires the ALJ to determine whether the individual's impairment or
9 combination of impairments meets or medically equals the criteria of an impairment listed
10 in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525,
11 404.1526, 416.920(d), 416.925, 416.926. If the individual's impairment or combination of
12 impairments meets or equals the criteria of a listing and meets the duration requirement
13 (20 C.F.R. §§ 404.1509, 416.909), then a finding of disabled is made. 20 C.F.R. §§
14 404.1520(h), 416.920(h). If the individual's impairment or combination of impairments
15 does not meet or equal the criteria of a listing or meet the duration requirement, then the
16 analysis proceeds to the next step.

17 Prior to considering step four, the ALJ must first determine the individual's residual
18 functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). The RFC is a function-
19 by-function assessment of the individual's ability to do physical and mental work-related
20 activities on a sustained basis despite limitations from impairments. SSR 96-8p. In making
21 this finding, the ALJ must consider all of the symptoms, including pain, and the extent to
22 which the symptoms can reasonably be accepted as consistent with the objective medical
23 evidence and other evidence. 20 C.F.R. §§ 404.1529 and 416.929; SSRs 96-4p, 96-7p.
24 To the extent that objective medical evidence does not substantiate statements about the
25 intensity, persistence, or functionally-limiting effects of pain or other symptoms, the ALJ
26 must make a finding on the credibility of the individual's statements based on a
27 consideration of the entire case record. The ALJ must also consider opinion evidence in
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1 accordance with the requirements of 20 C.F.R. §§ 404.1527 and 416.927 and SSRs 96-
2 2p, 96-5p, 96-6p, and 06-3p.

3 After making the RFC determination, the ALJ must then turn to step four in order to
4 determine whether the individual has the RFC to perform his past relevant work ("PRW").
5 20 C.F.R. §§ 404.1520(f), 416.920(f). PRW means work performed either as the individual
6 actually performed it or as it is generally performed in the national economy within the last
7 15 years or 15 years prior to the date that disability must be established. In addition, the
8 work must have lasted long enough for the individual to learn the job and performed at
9 SGA. 20 C.F.R. §§ 404.1560(b), 404.1565, 416.960(b), 416.965. If the individual has the
10 RFC to perform his past work, then a finding of not disabled is made. If the individual is
11 unable to perform any PRW or does not have any PRW, then the analysis proceeds to the
12 fifth and last step.

13 The fifth and final step requires the ALJ to determine whether the individual is able
14 to do any other work considering his RFC, age, education, and work experience. 20 C.F.R.
15 §§ 404.1520(g), 416.920(g). If he is able to do other work, then a finding of not disabled is
16 made. Although the individual generally continues to bear the burden of proving disability
17 at this step, a limited evidentiary burden shifts to the Commissioner. The Commissioner is
18 responsible for providing evidence that demonstrates that other work exists in significant
19 numbers in the national economy that the individual can do. *Lockwood v. Comm'r, Soc.*
20 *Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010).

21 **II. CASE BACKGROUND**

22 **A. Procedural History**

23 Shea applied for supplemental security income ("SSI") on October 9, 2015 with an
24 alleged disability onset date of June 30, 2006. (Administrative Record ("AR") 187-92.)
25 The application was denied initially (AR 106-09), and on reconsideration. (AR 113-15.)
26 Shea subsequently requested an administrative hearing. (AR 116.)

27 On February 27, 2017, Shea appeared at a hearing before an Administrative Law
28 Judge ("ALJ"). (AR 35-77.) John J. Komar, a vocational expert ("VE"), also appeared at

1 the hearing. (*Id.*) The ALJ issued a written decision on March 14, 2017, finding that Shea
2 was not disabled because he could perform work existing in significant numbers in the
3 national economy. (AR 16-34.) Shea appealed, and the Appeals Council denied review
4 on June 14, 2017. (*Id.* at 4-8.) Accordingly, the ALJ's decision became the final decision
5 of the Commissioner. Having exhausted all administrative remedies, Shea filed a *pro se*
6 complaint for judicial review on March 12, 2018. (ECF No. 1-1.)

7 B. ALJ's Decision

8 In the written decision, the ALJ followed the five-step sequential evaluation process
9 set forth in 20 C.F.R. §§ 404.1520 and 416.920. (AR 16-34.) Ultimately, the ALJ disagreed
10 that Shea had been disabled from October 5, 2015, the date the application was filed,
11 through the date of the decision. (*Id.* at 28.) The ALJ held that, based on Shea's RFC,
12 age, education, and work experience, there were jobs in the national economy that he
13 could perform. (*Id.* at 27-28.)

14 In making this determination, the ALJ started at step one. Here, the ALJ found Shea
15 had not engaged in substantial gainful activity from the application date of October 5, 2015,
16 through the date of the decision. (*Id.* at 21.) At step two, the ALJ found Shea had the
17 following severe impairments: loss of visual efficiency in the right eye, loss of central visual
18 acuity in the right eye, contraction of visual field in the right eye, psychotic disorder, and
19 obsessive-compulsive disorder rule out cognitive disorder. (*Id.*) At step three, the ALJ
20 found Shea did not have an impairment or combination of impairments that either met or
21 medically equaled the severity of those impairments listed in 20 C.F.R. Part 404, Subpart
22 P, Appx. 1; 20 C.F.R. §§ 416.920(d), 416.925, and 416.926. (*Id.* at 21-23.)

23 Next, the ALJ determined Shea had an RFC to perform medium work, as defined
24 by 20 C.F.R. § 416.967(c), except he could never climb ladders or scaffolds and never
25 crawl. (*Id.* at 23-26.) According to the ALJ's RFC determination, Shea was capable of
26 frequently climbing stairs and ramps, balancing, stooping, kneeling, and crouching. (*Id.*)
27 However, he could not perform activities that require binocular vision or good depth
28 perception. (*Id.*) He could not perform commercial driving or operate a motor vehicle for

1 work, and he must avoid concentrated exposure to moving mechanical parts and
2 unprotected heights. (*Id.*) Additionally, he could understand, remember, and carry out
3 simple, routine tasks and instructions. (*Id.*)

4 The ALJ found that Shea's impairments could be expected to cause the symptoms
5 alleged, but that his statements regarding the intensity, persistence, and limiting effects of
6 those symptoms were not entirely credible. (*Id.* at 24.) In reaching this conclusion, the
7 ALJ reviewed and discussed the objective medical evidence, medical opinions, and
8 factors weighing against Shea's credibility. (*Id.* at 24-26.) The ALJ then determined that
9 Shea was unable to perform any past relevant work. (*Id.* at 26.)

10 Proceeding to step five, and relying on the testimony of the VE, the ALJ determined
11 that Shea's age, education, work experience, and RFC would allow him to perform
12 occupations existing in significant numbers in the national economy, such as: courtesy
13 clerk, kitchen helper, or hospital cleaner. (*Id.* at 27-28.) Accordingly, the ALJ held that
14 Shea had not been under a disability since the filing of his application on October 5, 2015
15 and denied his SSI claim. (*Id.* at 28.)

16 **III. ISSUES**

17 Shea's motion for remand or reversal argues that the ALJ improperly denied him
18 SSI benefits by relying upon "fraudulent report[s] from 2 doctors who DON'T EXIST (sic)"
19 and, therefore, substantial evidence does not support the ALJ's finding of non-disability.
20 (See ECF No. 17.)

21 **IV. DISCUSSION**

22 A review of the administrative record shows that Shea was receiving SSI benefits
23 from 2006 to approximately September 2014. (See AR at 52-53.) Shea stopped receiving
24 SSI benefits while serving a term of incarceration. (*Id.*) Shea filed the instant application
25 for SSI benefits once his incarceration ended. (*Id.*) It is unclear to the Court what exactly
26 the prior finding of disability was based upon, but in reviewing the administrative record, it
27 appears Shea's prior claim was based, at least in part, on mental impairments. (See *id.*
28 at 82, 95, 98.) Shea filed his instant application for SSI benefits based only on blindness

1 in his right eye. (*Id.* at 187.) Shea does not appear to acknowledge any mental
2 impairments or limitations.

3 Even though Shea applied for SSI based only on blindness, the ALJ ultimately
4 concluded that Shea also suffered from the following severe mental impairments:
5 psychotic disorder and obsessive-compulsive disorder rule out cognitive disorder. (*Id.* at
6 21.) In evaluating Shea's severe mental impairments, the ALJ considered only the report
7 of the State psychological consultant. (*Id.* at 25.) The ALJ stated the following:

8 I accorded little weight to the State psychological consultant's opinion finding
9 the claimant has no severe medically determinable mental impairments (3A).
10 Although the evidence of record does not fully support the psychological
11 consultative examiner's opinions in 2012 and 2014, which notably are dated
12 prior to the instant application, the examiners' [sic] opinions do document
13 severe mental impairments dating back to 2012 and 2014 (4F, 5F). In given
14 the claimant the maximum benefit of the doubt, even absent updated
15 supporting medical documentation or mental health treatment, I accounted
16 for these impairments in the above residual functional capacity and accorded
17 partial weight to the psychological consultative examiner's opinions.

18 (*Id.* at 25-26.)

19 On January 20, 2016, the initial disability determination completed by Dr. George
20 Nickles and Dr. Rosalia Pereyra opined that Shea was not disabled, but the report
21 specifically noted that "there are discovered possible mental conditions based on [Shea's]
22 prior claim," and "[t]here is no sufficient evidence to adjudicate this case... there is limited
23 information on [Shea's] current level of functioning." (*Id.* at 83-84.) The report also noted
24 that Shea "does not allege any mental health conditions or limitations," and "PRT found
25 [Shea] as IE as the prior Y condition could not be addressed as [Shea] feels he does not
26 have a MH condition and did not attend YCE. Therefore the claim has insufficient
27 evidence to make an appropriate determination." (*Id.* at 82-83.) On August 23, 2016, the
28 disability determination on reconsideration completed by Dr. Jon Arnow and Dr. Rosalia
Pereyra again opined that Shea was not disabled and again noted Shea "does not allege
mental," and "based on the evidence and [Shea's] denial of mental limitations, mental
appears non-severe." (*Id.* at 98.) It appears no further inquiry was made into Shea's
mental limitations. A review of the transcript from the hearing with the ALJ shows that

1 Shea was not asked about his mental impairments and the VE was not asked any
2 hypotheticals factoring in mental impairments. (*See id.* at 35-77.)

3 An ALJ has a duty to fully and fairly develop the record and to assure that the
4 claimant's interests are considered. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.
5 2001). Because Shea was proceeding *pro se*, the ALJ should have been especially
6 diligent. *Id.* "An ALJ's duty to develop the record further is triggered only when there is
7 ambiguous evidence or when the record is inadequate to allow for proper evaluation of
8 the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); see 20 C.F.R.
9 § 404.1520b (describing when agency will further develop record). "The ALJ's duty to
10 develop the record fully is also heightened where the claimant may be mentally ill and thus
11 unable to protect [his] own interests." *Tonapetyan*, 242 F.3d at 1150 (citing *Higbee v.*
12 *Sullivan*, 975 F.2d 558, 562 (9th Cir. 1992)).

13 Although Shea applied for SSI based only on his vision, the ALJ ultimately
14 concluded that Shea suffered from severe mental impairments. (*See* AR at 21.) However,
15 the record is ambiguous and inadequate as to Shea's mental impairments, especially
16 given there is no current evidence in the administrative record related to psychotic disorder
17 and/or obsessive-compulsive disorder rule out cognitive disorder. Importantly, the ALJ did
18 not attempt to develop the record despite Dr. Nickles and Dr. Pereyra opining that there
19 was insufficient evidence to adjudicate the case. The ALJ was not free to ignore the
20 concern over the lack of a complete record upon which to assess Shea's mental
21 impairment. *See Tonapetyan*, 242 F.3d at 1150 (ignoring doctor's concerns over the lack
22 of a complete record upon which to assess claimant's mental impairment constituted
23 reversible error and warranted remand for further proceedings). Because the ALJ made
24 the specific finding that Shea suffered from severe mental impairments, the ALJ had a
25 duty to develop the record as it related to those impairments, which he failed to do.

26 Accordingly, the Court finds that the ALJ failed to develop the record fully and fairly
27 with respect to Shea's possible mental impairments, including psychotic disorder and
28 obsessive-compulsive disorder rule out cognitive disorder. Therefore, it is recommended

1 that this case be remanded for further development of the record with regard to Shea's
2 mental impairments, and for further appropriate proceedings in light of that additional
3 development. It is also recommended, that upon remand, Shea again be advised of his
4 right to representation.

5 **V. CONCLUSION**

6 Based on the foregoing, the Court recommends that Shea's motion to remand (ECF
7 No. 17) be granted, and that the Commissioner's cross-motion to affirm (ECF No. 18) be
8 denied.

9 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Local Rule IB 3-2, the parties may
10 file specific written objections to this Report and Recommendation within fourteen days of
11 receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
12 Recommendation" and should be accompanied by points and authorities for consideration
13 by the District Court.

14 2. This Report and Recommendation is not an appealable order and any notice
15 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
16 Court's judgment.

17 **VI. RECOMMENDATION**

18 **IT IS THEREFORE RECOMMENDED** that Shea's motion for remand (ECF No. 17)
19 be **GRANTED**, the Commissioner's cross-motion to affirm (ECF No. 18) be **DENIED**, and
20 that the case be **REMANDED** to the agency for further proceedings.

21 **DATED:** September 25, 2019.

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24 **UNITED STATES MAGISTRATE JUDGE**
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